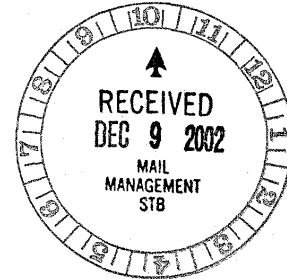


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LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1194
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com



THOMAS F. MCFARLAND

December 6, 2002

By UPS overnight mail
(Monday delivery)

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

FILED
DEC 9 2002

FILED
DEC 9 2002
SURFACE
TRANSPORTATION BOARD

Re: Finance Docket No. 34295, *Airlake Terminal Railway Company -- Acquisition and Operation Exemption -- Rail Line of Empire Builder Investments Incorporated and Progressive Rail, Incorporated, at Lakeville, MN*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Verified Notice Of Exemption Under 49 C.F.R. § 1150.31, for filing with the Board in the above referenced matter.

Also enclosed is a check for \$1,300 for the filing fee.

It is respectfully requested that the Board's notice of exemption (and Federal Register publication) be issued on or before December 31, 2002. While it is recognized that the exemption will become effective by operation of law seven days after filing of the notice of exemption at the Board, no written evidence of that fact is issued at that time. In order for the local property tax assessor to recognize Airlake Terminal Railway Company as an STB-authorized rail carrier for the 2002 tax year, written evidence of that fact, dated on or before December 31, 2002, is essential. Hence, this request.

ENTERED
Office of Proceedings

DEC 09 2002

Part of
Public Record

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Progressive Rail, Incorporated

FEE RECEIVED

DEC 9 2002

SURFACE
TRANSPORTATION BOARD

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BEFORE THE
SURFACE TRANSPORTATION BOARD

AIRLAKE TERMINAL RAILWAY)	
COMPANY -- ACQUISITION AND)	
OPERATION EXEMPTION -- RAIL LINE)	FINANCE DOCKET
OF EMPIRE BUILDER INVESTMENTS)	NO. 34295
INCORPORATED AND PROGRESSIVE)	
RAIL, INCORPORATED, AT)	
LAKEVILLE, MN)	



VERIFIED NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

AIRLAKE TERMINAL RAILWAY COMPANY
21778 Highview Avenue
Lakeview, MN 55044

Applicant

THOMAS F. McFARLAND
Thomas F. McFarland, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604
(312) 236-0204

Attorney for Applicant

DATE FILED: December 9, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD



AIRLAKE TERMINAL RAILWAY)
COMPANY -- ACQUISITION AND) FINANCE DOCKET
OPERATION EXEMPTION -- RAIL LINE) NO. 34295
OF EMPIRE BUILDER INVESTMENTS)
INCORPORATED AND PROGRESSIVE)
RAIL, INCORPORATED, AT
LAKEVILLE, MN

**VERIFIED NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31**

Pursuant to 49 C.F.R. § 1150.31, *et seq.* and 49 U.S.C. § 10502(a), AIRLAKE TERMINAL RAILWAY COMPANY (ATRC), a noncarrier, hereby provides verified notice of exemption from 49 U.S.C. § 10901 for its acquisition and operation of approximately 2.35 miles of railroad right-of-way and trackage at transloading and storage facilities owned by Empire Builder Investments Incorporated ("Empire") at Airlake Industrial Park, Lakeville, Minnesota ("Lakeville trackage"). The Lakeville trackage is more specifically described and depicted in Appendix 1-A (description) and Appendix 1-B (map) attached to this Notice.

**THE LAKEVILLE TRACKAGE IS A LINE OF RAILROAD THAT
QUALIFIES FOR THE CLASS EXEMPTION FROM 49 U.S.C. § 10901,
RATHER THAN TRACK EXCEPTED FROM BOARD ACQUISITION
AND OPERATION AUTHORITY UNDER § 10906**

The Lakeville trackage is presently owned by Progressive Rail, Incorporated (Progressive). The right-of-way land for that trackage and the transloading and storage facilities served by that trackage are owned by Empire, a noncarrier. Progressive is a rail carrier by virtue of its acquisition and operation of 9.1 miles of rail line in Bloomington, Minnesota. *See*

Progressive Rail, Inc. -- Acq. and Oper. Exempt. -- Canadian Pacific Railway, 2000 STB LEXIS 706 (STB Finance Docket No. 33943, notice served Nov. 30, 2000). However, Progressive has operated the Lakeville trackage as switching tracks excepted from Board acquisition and operating authority by virtue of 49 U.S.C. § 10906.

The Lakeville trackage is used in conjunction with transloading of commodities from rail to truck and from truck to rail and incidental storage at facilities owned by Empire at Airlake Industrial Park, Lakeville, Minnesota. Neither Empire nor Progressive owns nor has any financial interest in the commodities that are transloaded and stored at those facilities. A variety of shippers and receivers of freight utilize those transloading and storage facilities. Those transloading and storage services are held out as available to the general public.

The Lakeville trackage connects with Canadian Pacific Rail System (CPR). Currently, traffic to and from Airlake Industrial Park is interchanged between Progressive and CPR at Lakeville, Minnesota.

ATRC has agreed to acquire the Lakeville right-of-way and trackage by lease from Empire and Progressive, and to operate that trackage as a rail common carrier. The Lakeville trackage would constitute ATRC's entire line of railroad.

In those circumstances, the Lakeville trackage is properly considered to be a line of railroad under 49 U.S.C. § 10901 pursuant to the Board's tenant-use test, rather than spur, switching or side tracks excepted from Board authority over their acquisition and operation by virtue of 49 U.S.C. § 10906. The tenant-use test is described in the Board's decision denying reconsideration in *Effingham Railroad Company - Petition for Declaratory Order - Construction at Effingham, IL*, STB Docket No. 41986 and embraced proceedings, 1998 STB LEXIS 253,

decision served September 18, 1998; *aff'd sub nom. United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606 (7th Cir. 1999).

In that case, as here pertinent, Agracel Corporation transloaded beer from rail to truck at a warehouse that it operated in an industrial park at Effingham, IL. Agracel owned approximately 206 feet of right-of-way and track that extended between its warehouse and trackage owned and operated by Conrail. Previously, Conrail had operated over the Agracel trackage to provide service to Agracel. It was proposed that Effingham Railroad Company (ERRC), a noncarrier, substitute for Conrail as provider of the rail service over the Agracel trackage. ERRC filed a notice of exemption under 49 C.F.R. § 1150.31 for its operation over that trackage. The United Transportation Union (UTU) contended that the Board lacked authority over the proposed operation because the Agracel trackage is spur, switching or side track excepted from Board operation authority under 49 U.S.C. § 10906.

In finding that the Agracel trackage was a line of railroad under 49 U.S.C. § 10901, the Board said (1998 STB LEXIS 253, at 8-9 (emphasis in original):

... (I)n those cases where a tenant railroad's intended use of a track segment is different from the use made by the railroad owning the track, we have determined that the tenant's use, rather than the character of the trackage itself, is controlling with regard to its own operations, subject to consideration of the purpose and effect of the construction under *Texas & Pacific* (citations omitted).

In the initial notice, even under its new approach, ERRC became the operator of a line of track connecting Conrail to the site of the industrial park. Conrail clearly had operated this short track segment as an exempt siding or spur. However, because it was ERRC's initial railroad operation, this track segment became ERRC's entire line of railroad and was not, as to ERRC, a siding or spur. This small piece of trackage initiated ERRC's service from a connection or interchange point with Conrail to a shipper's facility within the industrial park. Thus ERRC's becoming the operator was the proper subject of the initial notice of exemption and was not statutorily exempt under section 10906.

It is apparent from the Board's decision in that case that the tenant-use test also applies when a new rail carrier is using the trackage pursuant to a lease rather than an operating agreement, and when the prior use of the track was by a third-party rail carrier rather than by the shipper-owner of the trackage. In upholding the Board's decision in that case, the reviewing court held that it was reasonable for the Board to classify the trackage by virtue of the tenant's use. *United Transp. Union v. Surface Transportation Bd.*, *supra*, 193 F.3d at 614. *Accord*: *Chicago Rail Link LLC - Lease & Oper. - Union Pacific R.R. Co.*, 2 S.T.B. 534 (1997), *aff'd sub nom. United Transp. Union - Illinois v. Surface Transp.*, 169 F.3d 474 (7th Cir. 1999); *Bulkmatic Railroad Corp. -- Acq. & Oper. Exempt. -- Bulkmatic Transp. Co.*, 2002 STB LEXIS _____ (STB Finance Docket No. 34145, decision served Nov. 19, 2002); and *Union Pacific R. Co. -- Operation Exempt. -- in Yolo County, CA*, 2002 STB LEXIS _____ (STB Finance Docket No. 34252, decision served Dec. 5, 2002, at 3, note 11).

Inasmuch as the subject transaction will be ATRC's initial railroad acquisition and operation, and the Lakeville trackage will constitute the entire line of railroad of ATRC, it follows that the Lakeville trackage is a line of railroad under 49 U.S.C. § 10901, rather than spur, switching or side tracks excepted from Board acquisition and operation authority by virtue of 49 U.S.C. § 10906.

INFORMATION REQUIRED BY 49 C.F.R. § 1150.33

(a) The full name and address of the applicant;

The full name and address of the applicant is Airlake Terminal Railway Company, 21778 Highview Avenue, Lakeville, MN 55044.

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

ATRC's representative is Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1890, Chicago, IL 60604, (312) 236-0204.

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

An agreement between Empire and Progressive on the one hand, and ATRC on the other, for the latter's lease and operation of the Lakeville trackage has been reached.

(d) The operator of the property;

ATRC will be the operator of the property.

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property,

The lessors of the line are Empire Builder Investments Incorporated and Progressive Rail, Incorporated, 21778 Highview Avenue, Lakeville, MN 55044.

(2) The proposed time schedule for consummation of the transaction,

The lease and operation are proposed to be consummated no earlier than seven days after the filing of this notice of exemption.

(3) The mile-posts of the subject property, including any branch lines, and

The Lakeville trackage is not described by milepost numbers. That trackage is described and depicted in Appendix 1-A and 1-B attached to this Notice.

(4) The total route miles being acquired;

A total of 2.35 miles of trackage is to be acquired and operated.

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States;

The required map is attached to this Notice as Appendix 1-B.

(g) A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III carrier.

The required certificate is attached to this Notice as Appendix 2.

CAPTION SUMMARY

A caption summary required by 49 C.F.R. § 1150.34 is attached to this Notice as Appendix 3.

ENVIRONMENTAL AND HISTORIC REPORT

The proposed operation does not require environmental and historic reporting. See 49 C.F.R. § 1105.6(c)(2)(i) and 49 C.F.R. § 1105.8(b)(1).

LABOR PROTECTION

Pursuant to 49 U.S.C. § 10901(c), labor protection requirements do not apply to this transaction.

VERIFICATION

The verification of Thomas F. McFarland in behalf of ATRC is attached to this Notice as Appendix 4.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, within 20 days of the filing of this Notice, the Director of the Board's Office of Proceedings should publish notice in the *Federal Register* of the filing of this notice of exemption. See 49 C.F.R. § 1150.32(b).

Respectfully submitted,

AIRLAKE TERMINAL RAILWAY COMPANY
21778 Highview Avenue
Lakeview, MN 55044

Applicant

Thomas F. McFarland

THOMAS F. McFARLAND
Thomas F. McFarland, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604
(312) 236-0204

Attorney for Applicant

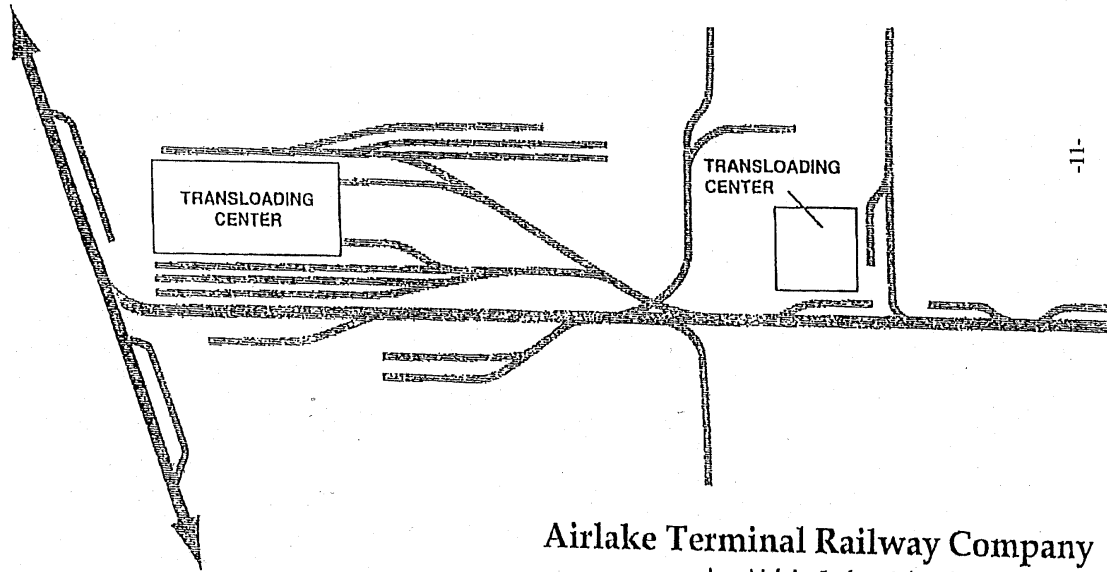
DATE FILED: December 9, 2002

Appendix 1-A

IDENTITY AND LENGTH OF LAKEVILLE TRACKAGE

<u>Track</u>	<u>Length (feet)</u>
Track 1	1836
Track 2	1620
Track 3	1620
Track 4	1080
Track 5	810
Track 6	1188
Track 7	1404
Track 8	756
Track 9	864
GT track	730
Twin City Brick track	<u>520</u>
TOTAL	12,428 feet = 2.35 miles

CPR to Savage



-11-

CPR to Northfield

Airlake Terminal Railway Company
-serving Airlake Industrial Park

Appendix 2

CERTIFICATION UNDER 49 C.F.R. § 1150.33(g)

Airlake Terminal Railway Company hereby certifies under 49 C.F.R. § 1150.33(g), that the projected revenues from the operation proposed in this matter do not exceed those that would qualify it as a Class III rail carrier.



Thomas F. McFarland

Thomas F. McFarland
*Authorized Representative of
Airlake Terminal Railway Company*

SUBSCRIBED and SWORN to
before me this 6th day of
December, 2002.

Kathleen Lenihan

Notary Public

CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

Notice of Exemption

FINANCE DOCKET NO. 34295,

***AIRLAKE TERMINAL RAILWAY COMPANY
-- ACQUISITION AND OPERATION EXEMPTION --
RAIL LINE OF EMPIRE BUILDER INVESTMENTS INCORPORATED
AND PROGRESSIVE RAIL, INCORPORATED
AT LAKEVILLE, MN***

Airlake Terminal Railway Company (ATRC), a noncarrier, has filed a Notice of Exemption to acquire from Empire Builder Investments Incorporated and Progressive Rail, Incorporated and operate a rail line consisting of approximately 2.35 miles of right-of-way and trackage at Airlake Industrial Park, Lakeville, Minnesota. Comments must be filed with the Board and be served on ATRC's representative, Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1890, Chicago, IL 60604, (312) 236-0204.

The Notice is filed under 49 C.F.R. § 1150.31. If the Notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Board

(SEAL)

Vernon A. Williams, Secretary

Appendix 4

VERIFICATION

STATE OF ILLINOIS)
)
COUNTY OF COOK)

Thomas F. McFarland, being duly sworn, states that he is attorney for Airlake Terminal Railway Company (ATRC); that he is familiar with the factual allegations made in the foregoing Notice of Exemption in behalf of ATRC; and that such allegations are true as stated.

Thomas F. McFarland

Thomas F. McFarland



SUBSCRIBED and SWORN to
before me this 6th day of
December, 2002.

Kathleen Lenihan

Notary Public